No. 17041

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MIKE TRAMA,

Respondent.

BRIEF FOR RESPONDENT.

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Jurisdiction.

This case is one wherein the National Labor Relations Board seeks to enforce its order of November 17, 1959 [R. 28-33][1] which concerns conduct which took place sometime during the period of September 1, 1957 to December 31, 1957.

Statement of Case.

1. The Board's Findings of Fact.

The Board found respondent had committed unfair labor practices in his treatment of the crewmen aboard the fishing vessel "SANDY BOY" during period of September 1, 1957, to December 31, 1957. The result of this conduct was that none of said crew was aboard said vessel as crewmen from January 1, 1958 to date of hearing of the Board's complaint.

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[1]References to portions of the printed record are designated "R." Numbers refer to pages.

2. Respondent and Facts Generally.

The facts as interpreted by the hearing examiner and adopted by the Board are stated in the petitioner's brief. The record reflects a great deal of the testimony. Respondent, feeling the record speaks for itself, will refer only sparsely to the testimony.

As in every dispute there are facts conceded to be true by all parties and those upon which there is a general disagreement.

There is general agreement respondent sought the assistance of the Board at its Los Angeles office in November of 1957[2] and his pleas for help were ignored because of lack of dollar volume of his business; that respondent again sought assistance in spring of 1958 with same result for same reason;[3] and that as late as July 1960, the Board refused to take jurisdiction of respondent for lack of dollar volume in calendar year 1959.[4]

There can be no dispute the sardine season in San Pedro in 1957 started September 1, 1957 and terminated December 31, 1957 (Cal. Fish & Game Code, Sec.

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[2]At page 5 of Petitioner's Brief there is the following language:

> "An attempt by respondent to use the processes of the National Labor Relations Board to end the boycott also failed because respondent did not meet the Board's current jurisdictional standards [R. 28-29, 14, n. 1, 19; 141-142]."

[3]Board in response to respondent's motion took official notice of fact that on March 21, 1958, respondent's petition in Case No. 21 RM 471 was dismissed by Regional Director of lack of jurisdiction [R. 29].

[4]See note 11, Petitioner's Brief, page 23 . . . Board dismissed representation proceedings involving respondent's employees (Case No. 21-RC 6233) for reason that data for calendar year 1959 indicated sales did not meet Board's jurisdictional standard of $50,000.00. *Fisherman's Cooperative Association, et al.,* 128 N. L. R. B. No. 11.

8151), nor that respondent sent to crewmen the notices to crewmen Buloni [R. 158], Mudry [R. 159], Ferrara [R. 160], and Lucca [R. 161].

Background of Respondent.

Respondent in 1959 was a twenty-five year old Italian immigrant of limited education who had first come to our country ten years before.[5] [R. 132.] He had three years of our schooling, achieving a ninth grade education. [R. 132.] At age sixteen he had started to fish with his father, Santo Trama, aboard a very small fishing vessel. Industriousness, perseverance and determination placed him in early part of 1957 as an operator of the small fishing vessel "FISHERMAN," at which time he and his father saw the need of a larger vessel and commenced construction. This new vessel was larger than the boat "FISHERMAN" but still by any standard a very small vessel.

Vessel "Sandy Boy."

The boat "SANDY BOY," which is the vessel upon which the crewmen were employed in this litigation, is 44 feet in length at the keel, the width being 16 feet. [R. 80.] The living quarters consist of a cabin ten feet wide, eleven to twelve feet long and about 7 feet high. In this cabin, the only enclosed area above decks, there are eight bunks, a tier of three on the starboard side, a tier of two on the port side, and a tier of three crosswise. [R. 80.] The balance of this cabin, which is very small, is set aside for cooking facilities, storage of food and a table area wherein all crewmen, in-

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[5]At time of action in this matter, September to December 1957, respondent would have been 23 years of age and in this country between 8 and 9 years.

cluding respondent, take their meals. The captain, or man in control (which is respondent), sleeps in one of these bunks. The vessel is controlled from a wheel situated on the top of the cabin area.

History of Dispute.

The boat "SANDY BOY" was not finished for the start of the sardine season of 1957. Endeavoring to finish it that it might commence fishing operations, the members of crew of the boat "FISHERMAN" assisted respondent in the efforts to ready the boat "SANDY BOY." The work and efforts of crewmen to outfit a boat for a fishing season was a normal and accepted practice and custom among those engaged in fishing industry in San Pedro.

Subsequent events caused the crewmen, who assisted in this operation, to institute an action in the Long Beach Municipal Court for services rendered. In this action wherein respondent was made the defendant, a verdict was rendered against the crewmen and for respondent.[6] [R. 103.]

Basically the difficulties which brought about the actions which form the basis of this lawsuit involve a jurisdictional argument between two rival unions, both

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[6]On April 1, 1958, in the Municipal Court of Long Beach Judicial District, County of Los Angeles, State of California, Vincent Buloni, Sal Lucca, Tony Affadi, Rosario Rizza and Nicholas Mudry, in Case No. 104526, sued Mike Trama, and Santo Trama for services rendered during construction of "Sandy Boy." These are same crewmen mentioned in the record of instant case. They were represented by firm of Margolis, McTernan and Branton, who represented them and Fishermen's Union, Local 33, ILWU, in the hearing before the trial examiner herein. Buloni, Lucca and Affadi each claimed $1,820.00. Rizza claimed $2,474.00 and Mudry claimed $1,589.66. On December 11, 1958, after trial, the Court rendered judgment that plaintiffs take nothing by reason of this action.

competing for the right to represent the crewmen of the boat "SANDY BOY." These unions are the Seine and Line Fishermen's Union of San Pedro, affiliated with AFL-CIO, and the Fishermen's Union, Local 33, affiliated with the ILWU. Both claimed the right to represent the crewmen of the "SANDY BOY," Seine and Line, by virtue of a working agreement with the boat "FISHERMAN," and Local 33, by virtue of a contract signed by respondent early in September 1957.

Of the actions of respondent prior to signing the contract with Local 33, and immediately subsequent thereto, there is very little dispute.

The record reflects agreement of all parties of the facts relative to signing of the agreement with Local 33, the attitude of Seine and Line, the picketing, and efforts of respondent to get the boat fishing.

Respondent's View of Facts as Seen by Board.

Respondent understands the position of petitioner to be basically:

1. That respondent did no wrong in negotiating with Local 33 and in signing contract.

2. That respondent did no wrong in fishing when Seine and Line refused to permit their men to work.

3. That respondent did no wrong in explaining to men the attitude of Seine and Line in attempting and succeeding in stopping the fishing operators of the "SANDY BOY."

4. That the men were not hired by the season.

5. That the action of respondent in not keeping the crewmen on board "SANDY BOY" after January 1, 1958, to be an unfair labor practice in that it was designed to coerce them in their right to determine their own bargaining agent.

Respondent's View of Facts.

1. There are two fishing seasons in San Pedro area; one being the sardine season from September 1, to December 31, the balance of the year being the mackerel season.

2. Crewmen are hired by the season only. They may be discharged for cause during the season.

3. Respondent had a contractual and legal right not to rehire the crewmen of "SANDY BOY" for the mackerel season of 1958.

Summary of Argument.

Respondent summarizes his contention that the order of Board should not be enforced by this Court, as follows:

1. Crewmen were hired by the season and contractually respondent had no obligation to them subsequent to December 31, 1957.

2. National Labor Relations Board has never properly established jurisdiction over respondent for year 1957.

3. Assuming jurisdiction may be asserted retroactively by the Board, this Court should not enforce any order made pursuant thereto as:

(a) The action of the Board is arbitrary and capricious.

(b) The action of Board in assuming jurisdiction is unfair and inequitable.

(c) The effect of respondent's conduct upon commerce is inconsequential and action of Board is one to enforce private rights, and not for public good.

Argument.

It is assumed evidence, on appeal, may always be found to substantiate trial court's findings. However respondent respectfully calls to attention of this Court that the trial examiner, in finding the crewmen were not hired by the season, has entirely disregarded reasonable facts and logic. Impliedly he has found men who worked on lay shores were hired for an indeterminate time. Should this be true, chaos would result to a boat owner when a crewman became injured and incapacitated. For what period of time would he be entitled to sue for loss of wages? Or should he be fired improperly, what would be his measure of damages? The trial examiner seems to have found it difficult to follow his own thinking. In his decision [R. 22] he says: "Despairing of persuading his view of the facts of life as they seemed to operate in the San Pedro area," and yet when confronted with a set of facts which were foreign to him he, as the crew, could not accept facts as they operate in the fishing industry. He could not find the crew to be hired for the season because of the work they had done in preparing the vessel for fishing. This finding of permanent employment is the basis for holding respondent for unfairly discharging the crew. The crewmembers' testimony and actions indicated they could leave the vessel at any time. Affidi left to go to Algiers, Buloni left for better fishing in Alaska, and Mudry said he could leave at any time as "he was not a slave." It is well known where a fisherman is employed on a lay shore basis he is either hired by the season or the trip. There is no other basis for determining his pay in the event of a mishap or misunderstanding.

Had there been any other arrangement, respondent would not have waited until December 31, 1957 to take the action he did. By contract based on custom and useage he did only that which he was legally entitled to do. He did no wrong.

Assuming respondent did not have the right to refuse to employ the crewmen after 1957 and his conduct was improper, respondent then vigorously asserts the actions of the Board are unjustified as there has been no jurisdiction established. This position is asserted prior to any argument of the propriety of retroactive jurisdiction. (Discussed *infra.*)

The entire jurisdictional basis of this case is upon the dollar volume of respondent for the year 1958. The Board has refused to consider jurisdiction of respondent for 1957 and 1959 upon the dollar volume (or lack of it) for those years. It is to be remembered the only acts of respondent under attack here were those of 1957. They were not continuing acts and did not carry past December 31, 1957.

Respondent contends his case is unique and not in the same category as any case cited by petitioner in its brief. Respondent feels the Board and petitioner may argue in theory at great length but cannot escape the bitter truth that its past treatment of respondent can never justify its present stand which is either unfair, inequitable, or, to say the least, arbitrary. Respondent in this position will rely only upon a very few cases.

In all cases cited by the government there is not one in which the respondent actively sought assistance from the Board, was refused, and left to his own devices.

Respondent here, when beset by a problem which was beyond him, and beyond assistance of the state courts, sought out the Board and beseeched it for help, only to be refused. Admittedly at this point he was in a difficult position and needed help. In effect he was told "The Board cannot help you. Work it out yourself." Again after he had, by his own efforts "worked it out" and had the boat fishing he voluntarily sought the Board's aid and was refused. When the Board called him to task its previous rulings concerning respondent were called to its attention to no avail. Surely at this point the Board should have asserted the position it had taken in *Compressed Air, etc. v. Union and James P. Kenny,* 93 N. L. R. B. 274; *C. A. Braukman, etc. and International Union of Operating Engineers,* 94 N. L. R. B. 234.

> ". . . The question thus posed is whether or not the Board should apply retroactively its present jurisdictional standards, and assert jurisdiction in the instant complaint case, although the Board had before and after the commission of the alleged unfair labor practices, refused to assert jurisdiction over Respondent's operations on the basis of then existing standards.
>
> "The Board believes that the question should be answered in the negative. This result is dictated not only by the Board's obligation to respect its own prior decisions, but also by desire for fair play. It would be inequitable now to hold the respondent liable for the activities in question, as the Board, almost 2 years ago, in effect advised the Respondent that such activities occurred at a

time when 'it would (not) effectuate policies of The Act to assert jurisdiction' over the respondent's operation."

To add to the arbitrariness of the Board, when an opportunity again was presented to Board to determine a representation suit involving respondent in 1960, it refused. The action of the Board has been to deny respondent access to the Board in 1957, 1958 and in 1960, on the basis of lack of dollar volume. However, it has on the one single occasion when it would harm him financially, sought by all means to assert jurisdiction. Curiously enough the dollar volume of 1958, upon which the Board bases jurisdiction, was accomplished by respondent's conduct of which the Board now complains. If he had done nothing and the boat had remained at the dock, it is to be presumed the Board would never have asserted jurisdiction.

The Board has expended considerable time, effort and money to pursue this matter. Petitioner has cited case after case to assert the right of the Board to act herein, but in all the verbiage can the petitioner honestly say, "this is fair, this is right?"

Assuming everything the Board has asserted is true and correct and petitioner's theories of retroactive assertion of jurisdiction are proper, can they honestly say to this Court—enforcement of this order is fair, just and equitable? The test is as set forth in *N. L. R. B. v. Guy F. Atkinson,* 195 F. 2d 141:

> "We think it apparent that the practical operation of the Board's change of policy, when incorporated in the order now before us, is to work hardship upon respondent altogether out of propor-

tion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors."

Petitioner attempts to distinguish the *Atkinson* case from this one by asserting the actions of respondent were known by him to constitute unfair labor practices. The test is whether respondent knew his conduct was wrong. In view of action of Board, was not respondent told to handle matters as he could and that the Act did not cover his business? Respondent believes the dissenting opinion in the matter of *N. L. R. B. v. Pease Oil Company, 279* F. 2d 135, to well state respondent's position herein concerning the fair play and equities involved.

"The instant case presents the question whether, a certain standard having been announced, and an employer having acted upon the assumption that it would be adhered to, he may be brought to book on the basis of a wholly different standard later announced, which later standard is well within the jurisdiction conferred on the Board by the statute." . . . Citing *Braukman* case, Court says:

"I think that the Board's language in the Braukman case . . . was an excellent expression of the standard of conduct which the government and its agencies should observe toward the public. The question is essentially one of fair play. The

> Board has, as the statute authorized it to do, petitioned this Court for a decree enforcing the Board's Order. A court of appeals, in determining whether or not such a decree should be issued, sits as a Court of Equity, and will not exercise the power of such a court to produce a result which court regards as essentially unfair."

That the action of the Board will work a hardship on respondent is a foregone conclusion. Retroactive pay for the crewmen would virtually force him to the wall, to be balanced by what public need?

N. L. R. B. v. E. & B. Brewing Co., 276 F. 2d 594, citing *N. L. R. B. v. National Container Corp.*, 211 F. 2d 525.

> "It is well settled that where, as here, an administrative agency in pursuance of its adjudicating function makes an ad noc change in one of its administrative policies, such change may be applied retroactively in an appropriate case . . . The test is whether 'the practical operation of the Board's change of policy . . . (will) work hardship upon respondent altogether out of proportion to the public ends to be accomplished." (Citing *N. L. R. B. v. Atkinson*).

If anything is to be accomplished by enforcement of the ruling of the Board, it can be only the economic gain of crewmen. Yet

> "The Courts have uniformly recognized that the National Labor Relations Act did not confer private rights, but granted only rights in the interest of the public to be protected by a procedure looking solely to public ends. The proceeding au-

thorized to be taken by the Board was not for the adjudication or vindication of private rights. *Haleston Drug Stores, Inc. v. N. L. R. B.*, 187 F. 2d 148."

It is true the Board in exercise of its administrative discretion in an endeavor to make an equitable order "has eliminated part of the retroactive pay ordered by the trial examiner," and this may in some manner assuage the conscience of the Board, but it would seem this only recognizes the justification of respondent's position and undermines that of the Board. Had the Board eliminated all retroactive pay there could be some basis for claiming the Board acted for the public good.

Conclusion.

It is respectfully submitted this Honorable Court should refuse to enforce the order of the Board.

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